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Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DeFUNIS, *et al.*,
Petitioners,

vs.

CHARLES ODEGAARD, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF AMICUS CURIAE STATE OF OHIO

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INTEREST OF STATE OF OHIO

The State of Ohio, pursuant to national policy, has initiated its own affirmative action programs. Since any decision in this case could affect these programs, the State, by its Attorney General, respectfully submits this brief as *amicus curiae* pursuant to Rule 42, Part IV of the Revised Rules of the Supreme Court of the United States.

OPINION BELOW

The opinion of the Supreme Court of Washington is reported at 507 P.2d 1169, *DeFunis, et al. v. Odegaard, et al.*

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of the State of Washington, *en banc*, was rendered on March 8, 1973. The petitioner's Motion for Rehearing was denied on May 16, 1973. The Petition for a Writ of Certiorari was filed on May 24, 1973, and granted on November 19, 1973. The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, §1 ". . ., nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION FOR REVIEW

Whether the admissions policy of the University of Washington's school of law, which considers the race of qualified applicants as an admissions factor, among other factors, violates the equal protection clause of the fourteenth amendment.

STATEMENT OF FACTS

The University of Washington College of Law received 1601 applications for admission to the first-year class of 1971. As a result of enrollment limitations only 150 of these applicants would secure a position at the law school. The determination as to whom would be admitted was left to the Admissions and Re-Admissions Committee, a committee established by the dean and faculty of the law school.

A person seeking admission must have received an undergraduate degree and taken the Law School Admissions Test (LSAT). Additionally, applicants were required to submit copies of transcripts from the universities and colleges which they attended, statements from the Dean of Students of those schools, and recommendations from faculty members in their major fields.

The Committee's goal was to isolate those individuals who in their judgment had the potential for outstanding academic achievement. From this group the committee selected applicants on the basis of their ability to make significant contributions to the law school and to the community at large. To make this determination the committee followed the criteria outlined in its Guideline for Applicants:

> "We gauged the potential for outstanding performance in law school not only from the existence of high test scores and grade point averages, but also from careful analysis of recommendations, the quality of work in difficult analytical seminars, courses, and writing programs, the academic standards of the school attended by the applicant, the applicant's graduate work (if any), and the nature of the applicant's employment (if any), since graduation." 507 P. 2d at p. 1174.

The procedure utilized by the committee to choose those 150 persons who would comprise the first-year class

was the following. Initially, a preliminary ranking system was used in which Junior-Senior grade point averages and LSAT scores were converted into a single figure or index. This was called the Predicted First-Year Average (PFYA). After ranking all applicants in this manner, the Committee decided from past experience that those applicants with PFYAs above 77 were to receive the immediate attention of the entire committee so that an early decision could be made as to their suitability. Persons with PFYAs below 74.5 were reviewed by the Chairman of the Committee alone, and admission was ordinarily declined unless some redeeming matter was seen in his file that warranted the consideration of the entire committee. Applications of minority individuals (Black, Chicano, American Indian, Filipino) were to be considered by the Committee regardless of PFYA score.

Final consideration of those individuals with PFYA scores between 74.5 and 76.99 and certain persons with PFYAs above 77 and minority group members was deferred until after the final deadline for receipt of applications. Petitioner was within this category due to a PFYA of 76.23. At this point, files were randomly distributed to committee members for individual consideration. The files of black applicants, however, were referred to the same two committee members. Similarly, applications of Chicanos, American Indians and Filipinos were always reviewed by another committee member.

The purpose of this procedure was to assure a reasonable representation within the law school of those minority groups which have traditionally been underrepresented.[1] This university-wide policy recognized that a purely mathematical approach to admissions often excluded quali-

[1] Of the 356 law students enrolled in 1969, 8 were black. Defendant's Ex. #7.

fied members of certain minority groups with a consequential underrepresentation in the legal system. The end result was that the law school admitted some members of the minority group with lower "mechanical credentials" than majority group applicants. The Committee did not admit unqualified persons and it did not establish a quota system for minority admissions.

Because of the difficult judgment factors to be weighted in the admission process, those ultimately admitted did not exactly follow PFYA rankings. Of those who were extended invitations, 74 had lower PFYAs than petitioner; 36 of these were minority persons; 22 were veterans who had previously been admitted, and 16 were applicants judged by the Committee as deserving invitations on the basis of other information contained in their files. Of those denied admission along with petitioner, 29 had higher PFYAs than the petitioner.

The record also reflects that the University of Washington's school of law had as its goal to become a "national" law school, and therefore attempted to draw applicants from throughout the country, not only from the State of Washington. 507 P. 2d at p. 1190.

SUMMARY OF ARGUMENT

The University of Washington law school's minority admissions policy, in which an applicant's race is a factor considered in deciding what is the probability of the individual succeeding in law school and making a significant contribution to law school classes and the community at large is a constitutional exercise of the school's discretionary powers.

There is no evidence in the record under this standard which demonstrates that petitioner was more qualified than minority students admitted to the law school. Under this standard the law school invited for admission 74 applicants with lower PFYAs than petitioner, of whom 36 were minority, 22 were returning from military service, and 16 were applicants judged by the admissions committee as deserving invitations based on information contained in their files.

Because the minority admissions policy promotes a compelling state interest in remedying past discrimination, which restricted minority persons' access to the school and the legal profession, it satisfies the equal protection clause of the fourteenth amendment to the United States Constitution. Even if the law school has not engaged in past discrimination and the underrepresentation of minorities in the law school is due to *de facto* segregation, the equal protection clause permits consideration of race to remedy any racial discrimination. This is true even though the law school's policy may not be required by the equal protection clause, because the discretionary power of public authorities to remedy any racial discrimination is broader than that of the judicial branch.

Moreover, the minority admissions policy is consistent with national public policy to encourage or require affirmative action to eliminate racial discrimination.

ARGUMENT

I. THE LAW SCHOOL'S ADMISSION POLICY WAS BASED UPON A STANDARD OF DETERMINING THE PROBABILITY OF AN INDIVIDUAL SUCCEEDING IN LAW SCHOOL AND MAKING A SIGNIFICANT CONTRIBUTION TO LAW SCHOOL CLASSES AND THE COMMUNITY AT LARGE.

Petitioner's argument that the law school violated his right to equal protection of the laws under the fourteenth amendment to the United States Constitution is premised on his being more qualified than minority students admitted to the law school; this belief is based on the fact that his Predicted First Year Average (PFYA) of 76.23 was higher than the PFYA of many minority students who were accepted. As a result, petitioner asserts in his brief that his denial was on the basis of "race alone" or "solely on the basis of race." Brief, pp. 2, 3. This is overstating the issue before this Court since race was only a consideration in the admissions procedure.[2]

The PFYA was arrived at by combining the junior-senior grade point average and the scores received on the LSAT. Then a formula was utilized to compute the PFYA.[3] There is no magic in the PFYA. Whether one applicant is more qualified than another cannot be determined by PFYAs alone. Yet, petitioner would not allow any deviation from the relative numerical ranking provided by the PFYAs. Despite petitioner's attempts to portray the PFYA as an objective standard determinative of ability to complete the law school program, the fact is that the law school

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[2] The Supreme Court of Washington found:

An applicant's racial or ethnic background was considered as one factor in our general attempt to convert formal credentials into realistic predictions. 507 P.2d at p. 1174.

[3] The record does not reflect the precise formula used nor does it reflect that the formula itself was objective. 507 P.2d at p. 1173.

did not limit its inquiry to a purely mathematical formula, nor should it have done so. In reviewing each applicant's file, the same basic question was considered: what is the probability of the individual succeeding in law school and making a significant contribution to law school classes and the community at large? This question cannot be answered by a mathematical formula. Although such a standard lends itself to subjectivity, it is submitted that the method of calculation of the PFYA itself is subjective in at least two ways. To the extent that it reflects the applicant's junior-senior grade point average, it is not objective because comparing grades achieved at one undergraduate college with grades achieved at another college assumes that both colleges grade on the same standard, when in reality different colleges may grade either more strictly or more liberally and some colleges are more demanding and competitive than others. Further, within any given college, certain courses of study may be more difficult to achieve higher grades than other fields. The second subjective element in the PFYAs was weighing an applicant's LSAT scores. Whether the law school aptitute test (LSAT) in fact bears a cultural bias rendering the test less reliable as a predictor of law school performance for minority students is not in issue in this case. (As the Court found, the LSAT's validity under *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) is not in issue, 507 p. 2d at p. 1186.) A number of courts including this Court have recognized that minority group persons perform substantially less well than white persons on generalized "intelligence" or "aptitude" tests. *Griggs v. Duke Power Co., supra; Hobson v. Hansen*, 269 F. Supp. 401 (D. D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1968), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969); *Chance v. Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972);

Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); *Arrington v. Mass. Bay Transit Authority*, 306 F. Supp. 1355 (D. Mass. 1969); *See also* Cooper and Sobol, *Seniority and Testing Under the Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARVARD LAW REVIEW 1598 (1969).

In addition to the above cases, there is a body of literature suggesting that numerical indicators of academic ability are unreliable in evaluating minority persons.[4] Similar conclusions in the validity of numerical scores in evaluating ability are reached in the literature on testing for employment purposes.[5] Because numerical indicators may have a discriminatory effect upon minorities, the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance both require that tests be validated for various racial and ethnic groups through empirical study. 29 C.F.R. 1607; 41 C.F.R. 60-3.

The President of the University of Washington was aware of this possible testing bias. He testified to his belief that the conventional standards were unreliable, and that other indicators of qualification, evidenced by an individual's background, should be used to judge potential to succeed in the school's program.

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[4] Gozanski and DeVito, *An Enlightened Comparison: The Relevant Strengths and Weaknesses of the CLEO Program and the Pre-Start Program of Emory University*, 1970 U. OF TOLEDO L. REV. 719; Gellhorn, *The Law Schools and the Negro*, 1968 DUKE L. J. 1069; Fleming and Pollack, *The Black Quota at Yale Law School*, 19 PUBLIC INTEREST 44 (1970); Comment, *Current Legal Education of Minorities: A Survey*, 19 BUFFALO L. R. 639 (1970); Scoles, *Challenge and Response in Legal Education*, 48 ORE. L. REV. 129 (1969).

[5] Cooper and Sobol, *Seniority and Testing Under the Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, supra*; *Race, Employment Tests and Equal Opportunity*, INDUSTRIAL MANAGEMENT, March, 1966; Barrett, *Gray Areas in Black and White Testing*, HARVARD BUSINESS REVIEW, Jan.-Feb. 1968; Note, *Legal Implications of Standardized Ability Tests in Employment and Education*, 68 COLUMBIA LAW REVIEW 692 (1968).

It is the law school's task to develop sensitive performance-related admission criteria which will reflect those qualities necessary to achieve the school's educational mission. There were 1601 applicants for the class beginning in the fall of 1971, but only places for 150 students. Most of the 1601 were qualified. As the lower court found:

> "Of the applicants invited for admission, 74 had lower PFYAs than plaintiff; of these 36 were minority, 22 were returning from military service, and 16 were applicants judged by the committee as deserving invitations on the basis of other information contained in their files. Twenty-nine applicants with higher PFYAs than plaintiff's 'were denied admission' ". 507 P.2d at p. 1176.

It is essential that the admissions committee be granted discretion in determining what qualifications are desirable in its student body to enhance the quality of the education it provided. Nothing in the record demonstrates that petitioner was more qualified than minority students admitted to the law school other than some numerical indicators which do not reliably measure the qualities which the law school felt best qualified an applicant to enhance the educational goals of the school. The law school should be permitted to put the numerical indicators in their proper perspective, rather than be forced to rely on such indicators where the effect of such reliance is to exclude minority persons. The law school's action is analogous to what this Court required in *Griggs v. Duke Power Co., supra.* As Justice Wright stated in his concurring opinion below:

> "Of course, the easy way would be to devise a purely mathematical formula for admissions and then apply it inflexibly. That, however, might not produce the best results. It is a matter in which the administra-

tion of the university and of the law school should exercise some discretion. Certainly there is enough intelligence, experience and common sense within the admissions committee to properly exercise its discretion." 507 P.2d at pp. 1188, 1189.

The law school's standard for admissions was not solely the PFYAs nor was it solely the basis of race as petitioner alleges. The standard was the probability of an applicant succeeding in law school and making a significant contribution to the school and the *community*. Under such a standard, the law school was justified in considering race as one of the factors in reaching its admissions decision.

II. THE UNIVERSITY OF WASHINGTON'S MINORITY ADMISSION PROGRAM PROMOTES A COMPELLING STATE INTEREST THEREBY SATISFYING THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A statute or regulation classifying on the basis of race has been considered by this Court so "inherently suspect" that it is subjected to "the most rigid scrutiny." To be upheld as constitutionally permissible, it must promote a "compelling governmental interest," *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), or serve some "overriding" purpose, *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). Although such classifications require a heavier burden of justification, they are not in and of themselves violative of the equal protection clause.

A. The Law School's Minority Admissions Policy Is Appropriate Affirmative Action to Remedy Any Past Discrimination Which Restricted Minority Persons' Access to the School.

There are striking similarities between the action which the law school voluntarily took and actions which

construction contractors have been required to take in response to statistical evidence of past discrimination. For example, based on statistical evidence that minorities were underutilized, the Commonwealth of Massachusetts required each contractor on a certain project to take every possible measure to employ not less than twenty percent minority workers in each job category. Herein, the law school, based on statistical evidence that minorities were underrepresented, voluntarily made efforts to increase minority admissions.

In upholding the contract provisions imposed by the Commonwealth of Massachusetts as not in violation of the equal protection clause, the Court in *Associated General Contractors v. Altshuler*, ___ F. 2d ___, 6 FEP Cases 1031 (1st Cir., Nov. 30, 1973) stated:

> "[I]n the present instance, there is no question that a compelling need exists to remedy serious racial imbalance in the construction trades, particularly in Roxbury, Dorchester, and South End, where minorities constitute approximately forty per cent of the population, and yet only about four per cent of the membership of buildings trades unions and where there has been a long history of racial discrimination in those unions. Such an imbalance within the relatively lucrative, highly visible, and expanding construction trades undermines efforts at achieving equal opportunity elsewhere in the economy, and contributes to racial tensions."

Similarly, there is a compelling state interest to eliminate the gross underrepresentation of minorities in the legal profession. The law school's efforts to remedy this imbalance should also be upheld.

The issue of whether the law school engaged in past discriminatory admissions policies received insufficient

attention by the courts below. Neither party to this action had any incentive to present evidence on the issue. A finding of any past discrimination would certainly have been detrimental to petitioner's cause, and therefore no assertion of such discrimination was made by petitioner. The law school, in responding to petitioner's allegations did not *sua sponte*, admit to any past discrimination, except to recite racial statistics for its 1969 school year, showing that 8 out of the 356 students enrolled were black.[6]

There does exist, however, a body of statistical data on the participation of minority group persons in the legal profession as law students, lawyers, or judges—which demonstrates with irrefutable clarity that minorities are grossly underrepresented. The use of unnecessarily rigid admissions criteria, weighted heavily towards use of standardized tests and mechanical scores, may have served to restrict minority applicants access to law schools, the first essential step towards participation in the legal profession. Essentially the statistical evidence[7] shows that less than

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[6] Defendant's Exhibit No. 7.

[7] REPORT OF BLACK LAWYERS AND JUDGES IN THE UNITED STATES, 1960-1970, 91st Cong., 2d Sess., 116 Cong. Rec. 30786 (1970); UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF CENSUS, GENERAL POPULATION CHARACTERISTICS OF THE STATE OF WASHINGTON, Tables 17 and 18 (1970); 1971 *Survey of Minority Group Students in Legal Education*, 24 JOURNAL OF LEGAL EDUCATION 487 (1972); Morris, *Equal Protection, Affirmative Action, Racial Preference in Law Admissions*, 49 WASH. L. REV. 1 (1973); Atwood, *Survey of Black Law Student Enrollment*, 16 STUDENT LAWYER JOURNAL 18 (June, 1971); *Blacks and the Law*, 407 ANNALS, AM. ACAD. POL. & SOC. SCIENCE 147 (May, 1973); Toles, *Black Lawyers and Judges in the United States*, 16 STUDENT LAWYER JOURNAL 24 (June, 1971); UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF CENSUS, CHARACTERISTICS OF POPULATION, WASHINGTON, Vol. 49, Tables 120, 122 (1960); UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DIGEST OF EDUCATIONAL STATISTICS, Table 94 (1972). UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, Tables 248, 250 (1971).

one percent of all lawyers in the State of Washington are black and that only slightly over one per cent of all lawyers in the nation are black. Although statistical evidence is less clear on participation of minorities in law schools, the percentages of minority lawyers are relevant and reflect past law school admissions policies because access to law school is the first step in entering the profession. Only in recent years, through affirmative action programs such as that challenged herein, have minority persons begun to gain access to the legal profession.

Statistical evidence showing racial disparity has been readily acknowledged by this Court and the lower federal courts as sufficient to establish a *prima facie* case of discrimination. In *Turner v. Fouche*, 396 U.S. 346 (1969), this Court supported the use of statistics to establish a *prima facie* case of jury discrimination. Further, in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971) this Court stated:

> "[W]here it is possible to identify a 'white school' or a 'Negro School' simply by reference to the racial composition of teachers and staff . . . a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown."

By this test, the respondent law school was a "white school" based upon its 1969 racial statistics. In *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971), the plaintiff therein did not offer any proof of individual instances of discrimination but relied on statistical evidence which the court held established a *prima facie* case of discrimination. Other cases relying on statistical data as *prima facie* support for the inference that racial discrimination has resulted in racial imbalance include: *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950

(1972); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971), *cert, denied*, 404 U.S. 984 (1971); *Hobson v. Hansen, supra. Cf. Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970), where it was held that statistics showing severe racial imbalance established, as a matter of law, a case of discrimination.

Herein, the statistics which demonstrate the gross underrepresentation of minorities in the legal profession nationally and in the State of Washington raise the presumption that minority persons have been discriminated against in admission to the law school.

It is not relevant to a determination of past discrimination that the law school may not have *intended* to discriminate in its admissions policies, if the effect of its policies was to unnecessarily restrict access of minority persons to the law school. This Court and lower federal courts have enunciated that proof of intent to discriminate is not required to establish discrimination. *Griggs v. Duke Power Co., supra* at 432 (1971); *Local 189, Papermakers v. United States*, 416 F.2d 980, 995-97 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *Clark v. American Marine Corp.* 304 F. Supp. 603, 607 (E.D. La. 1969); *Clark v. H. K. Porter Co.*, 296 F. Supp. 40, 115 (N.D. Ala. 1968); *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413, 448 (S.D. Ohio 1968).

Nor is it relevant that much of the statistical evidence on minority persons' participation in the legal profession is not specifically concerned with the respondent law school. In declaring that the use of certain tests discriminated against blacks in *Griggs v. Duke Power Company, supra*, this Court cited two Equal Employment Opportunity Commission (hereinafter referred to as EEOC) decisions involving the use of the same tests, but by different companies, as those used by the Duke Power Company.

The EEOC in each instance found use of the tests discriminatory. Also, the Court in *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401, *aff'd in relevant part*, 472 F.2d 631 (1972), *rehearing denied*, 472 F.2d 631 (9th Cir., 1973) relied on national statistics rather than specific company statistics, in determining the company had discriminated. *See also Johnson v. Pike Corp.*, 332 F. Supp. 490 (C.D. Calif. 1971). General knowledge, unrelated to a specific employer, that minority persons score lower on general aptitude tests than whites was relied on as evidence of discriminatory effect in *Griggs v. Duke Power Co., supra; Arrington v. Mass. Bay Transportation Authority, supra;* and *Hobson v. Hansen, supra.*

Once past discrimination is established, specific numbers, percentages, and ratios have been written into remedies, as part of the courts' general equity powers. Although the formulas vary, they all have as their goal the elimination of the effects of discrimination and they are used as a remedial step. In the school desegregation area, this Court, in *Green v. County School Board*, 391 U.S. 430 (1968) imposed the burden upon school officials of coming "forward with a plan that promises realistically to work, and promises realistically to work now." *Green, supra*, at 439. Furthermore, that intentional, official consideration of race is permissible when necessary to remedy past discrimination and to assure equal opportunity has been made clear by this Court and lower federal courts in cases determining which children shall attend a specific public school, *Swann v. Charlotte-Mecklenburg Board of Education, supra;* in selecting grand juries, *Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966); tenants for public housing, *Otero v. New York City Housing Authority*, 42 U.S.L.W. 2185 (2d Cir. Sept. 12, 1973); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968); and

school administrators, *Porcelli v. Titus*, 431 F.2d 1254 (3d Cir. 1970).

Official recognition of race, similar to that by the University of Washington law school, has been upheld as constitutional in two contexts where a need has been shown to increase minority participation because past discrimination has resulted in underrepresentation. First, lower courts have been upheld in ordering remedial action "which will so far as possible eliminate the discriminatory effects of the past . . .," *Louisiana v. United States*, 380 U.S. 145, 154 (1965). Remedial action approved by courts includes ordering unions to grant immediate membership to a specific number of qualified minority applicants, *United States v. Wood, Wire and Metal Lathers International Union, Local No. 46*, 471 F.2d 408 (2d Cir. 1973), *cert. denied*, 41 U.S.L.W. 3645 (U.S. June 12, 1973); to fill 30% of a union's future apprentices for each class of workers with blacks, *United States v. Ironworkers Local 86, supra;* to match normal referrals on an alternating (one-for-one) basis until a specific objective has been obtained, *Heat and Frost Workers, Local 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969); to hire one minority worker every time two white workers were hired, up to a certain number, *Carter v. Gallagher, supra;* and to give priority in future hiring to black and Spanish-speaking applicants for police positions, who had failed to measure up to a constitutionally impermissible set of hiring standards, *Castro v. Beecher, supra.*

Th second context involves cases challenging federal affirmative action plans. Specific percentage goals and timetables for minority hiring were approved in the Philadelphia Plan, *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*, 311 F. Supp. 1002 (E.D. Pa. 1970), *aff'd*, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S.

854 (1971); the Cleveland Plan, *Weiner v. Cuyahoga Community College District*, 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), *cert. denied*, 396 U.S. 1004 (1970); and the Illinois Ogilvie Plan, *Southern Illinois Builders Ass'n v. Ogilvie*, 327 F. Supp. 1154 (S.D. Ill. 1971), *aff'd* 471 F.2d 680 (7th Cir. 1972). Further, contract provisions imposed by the Commonwealth of Massachusetts requiring each contractor on a certain project to take "every possible measure" to employ not less than twenty percent minority workers in each job category was upheld in *Associated General Contractors v. Altshuler, supra.*

In each of the employment cases cited *supra*, the requirement that a qualified minority be hired necessarily reduced the number of positions available to whites (similarly when majority persons were given preference, slots for minority persons were reduced) even though no court has ordered that a white currently employed be fired to make room for a minority employee. Similarly, in the case herein, acceptance of a minority applicant to one of the limited number of positions available in the first year class reduces by one the number of positions available to white applicants. But no white student already admitted is displaced by the law school's admissions policies.

By analogy to the employment cases set out above, it is permissible for the law school to consider race as a factor in selecting qualified members of minority groups for admission. Indeed, if the issues had been presented to the courts by minority group members who had been discriminatorily denied access to the school, it would be the duty of the court to remedy the past discrimination by requiring affirmative action similar to that voluntarily taken by the school.

The law school found itself in the same position as the craft unions—with minorities grossly underrepre-

sented—and determined that only affirmative action of the kind ordered by the courts in the cases above could remedy this underrepresentation. And the law school undertook such action without the necessity of a court order. The fact that the law school sought to voluntarily remedy the situation prior to any suit being brought against it does not make the law school's action violative of the equal protection clause.

B. Although the Law School's Minority Admissions Policy May Not Be REQUIRED by the Equal Protection Clause of the Fourteenth Amendment, the Constitution PERMITS This Exercise of the School's Discretionary Powers To Remedy Any Racial Discrimination.

It is essential in this case to keep the issue in focus: the question is not whether the equal protection clause of the fourteenth amendment *requires* the law school to take affirmative action to eliminate segregation, but whether the Constitution *permits* the law school to remedy racial imbalance through its minority admissions policy. In answering this question, the *de jure—de facto* segregation distinction becomes unimportant, because the discretionary power of public authorities to remedy any racial discrimination is broader than that of the judicial branch. In *Swann v. Charlotte-Mecklenburg Board of Education, supra* at 16, this Court stated:

> ". . . it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. *Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary.* Judicial authority enters only when local authority defaults.
>
> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example,

that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. *To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.*" (Emphasis added.)

In *Katzenbach v. Morgan*, 384 U.S. 641 (1966) the Attorney General of the State of New York argued that the Voting Rights Act of 1965 could not be sustained as appropriate legislation to enforce the equal protection clause unless the judiciary decides that the state action prohibited by the act of Congress is forbidden by the equal protection clause itself. This Court disagreed with the New York State Attorney General stating at page 653 that:

> ". . . it was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations. . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did."

Both the *Swann, supra,* and *Katzenbach, supra,* decisions point out that what is *permitted* by the fourteenth amendment is much broader than what is *required* by the fourteenth amendment, and that while the courts may be unable to act until a violation of the Constitution occurs, other decision-making bodies within our society are not so limited. Thus, school boards, Congress and other public authorities can remedy problems as they perceive them and implement solutions without violating the Constitution. Here, the law school responded to the problem of racial imbalance in the law school, and the legal profession, by increasing the number of qualified minority students ad-

mitted. Whether the discrimination was *de jure*, thus *requiring* affirmative action, or *de facto*, *permitting* affirmative action, the law school's admission policy is not violative of the equal protection clause of the fourteenth amendment.

That voluntary action is permissible, even though not necessarily required by the equal protection clause is exemplified by case law. Voluntary action taken by the city school board in *Porcelli v. Titus*, *supra*, to integrate the system's administrative staff of principals and vice-principals was upheld as not in violation of the fourteenth amendment. In that case, a group of white teachers alleged that the board gave preference to black candidates by suspending the ordinary promotion system. The superintendent then presented recommendations for appointments of principals and vice-principals, candidly admitting that color was a prime factor, but not the only factor, as only qualified individuals were included in the recommendations. The court stated at page 1257:

> "State action based partly on considerations of color, when color is not used *per se*, and in furtherance of a proper governmental objective [integration of faculties], is not necessarily a violation of the Fourteenth Amendment."

Similarly, the law school considered race, but admitted only qualified applicants to its program.

The Court of Appeals for the Second Circuit in *Offermann v. Nitkowski*, 378 F.2d 22 (1967), in refusing to enjoin school officials from implementing a plan to eradicate *de facto* school segregation by use of explicit racial classifications, stated at page 24:

> "That there may be no constitutional duty to act to undo *de facto* segregation, however, does not mean that such action is unconstitutional."

The court further stated:

> "Where [consideration of race] is to insure against, rather than promote deprivation of equal educational opportunity, we cannot conceive that our courts would find that the state denied equal protection to either race by requiring its school boards to act with awareness of the problem." *Offermann, supra*, at 24.

See also Springfield School Committee v. Barksdale, 348 F.2d 261 (1st Cir. 1965); *Deal v. Cincinnati Board of Education*, 369 F.2d 55, 61 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); and *Wanner v. County School Board of Arlington County*, 357 F.2d 452, 455 (4th Cir. 1966).

A statute of the Illinois legislature requiring school boards to revise attendance units in school districts to eliminate racial separation of children in public schools, whether *de jure* or *de facto*, was upheld by the Supreme Court of Illinois against an attack which urged that the requirement that race be considered a factor violated the equal protection clause of the fourteenth amendment. *Tometz v. Board of Education*, 39 Ill. 2d 593, 237 N.E. 2d 498 (1968). In reaching its decision the court surveyed cases concerning state laws or administrative policies of school boards or other public authorities, directed towards reduction or elimination of *de facto* segregation of children in public schools, and found that such policies have been approved by every high state court which has considered the issue.[8]

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[8] New York - *Addabbo v. Donovan*, 16 N.Y.2d 619, 261 N.Y.S.2d 68, 209 N.E.2d 112 (1965), *cert. denied*, 382 U.S. 905 (1965); Pennsylvania - *Pennsylvania Human Relations Commission v. Chester School District*, 427 Pa. 157, 233 A.2d 290 (1967); Massachusetts - *School Committee of Boston v. Board of Education*, Mass., 227 N.E.2d 729 (1967), *appeal dismissed* (for want of a substantial federal question), 389 U.S. 572 (1968); New Jersey - *Booker v. Board of Education*, 45 N.J. 161, 212 A.2d 1 (1965); *Morean v. Board of Education*, 42 N.J. 237, 200 A.2d 97

(Footnote continued on following page)

The Washington Supreme Court in *State ex rel. Citizens Against Mandatory Bussing v. Brooks*, 80 Wn. 2d 121, 128 (1972), stated:

> "Reason impels the conclusion that, if the constitution supports court directed mandatory bussing to desegregate schools in a system which is dual 'de jure', then such bussing is within the appropriate exercise of the discretion of school authorities in a system which is dual 'de facto'."

Similarly, in the case herein, where a court could order affirmative action if the lack of minority persons attending the law school resulted from *de jure* segregation, the law school ought to be permitted to continue its voluntary affirmative action to remedy any racial discrimination.

C. It Is the National Public Policy to Encourage or Require Affirmative Action to Eliminate Any Racial Discrimination in Our Society.

To hold that the equal protection clause of the fourteenth amendment does not permit the law school to remedy any racial discrimination through its minority admissions policy would be to reject the thrust of this nation's public policy expressed by Congressional Act, Presidential Executive Orders, and the rules and regulations of federal departments and agencies which encourage or require affirmative action to eliminate racial discrimination in our society.[9] Congress, in Title VI of the Civil

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(1964); California - *Jackson v. Pasadena City School District*, 59 Cal. 2d 876, 31 Cal. Rptr. 606, 382 P.2d 878 (1963); Washington - *State ex rel. Citizens Against Mandatory Bussing v. Brooks*, 80 Wn.2d 121, 492 P.2d 536 (1972); *see also Guida v. Board of Education of City of New Haven*, 26 Conn. Sup. 121, 213 A.2d 843 (1965).

[9] Such national policy has been undertaken to reverse the apartheid policy our country adhered to prior to *Brown v. Board of Education*, 347 U.S. 483 (1954) and supported by *Plessey v. Ferguson*, 163 U.S. 537 (1896).

Rights Act of 1964, Section 601, 42 U.S.C. §2000d, stated that:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

In the next section of the same act, which petitioner failed to recite in his brief p. 27, Section 602, 42 U.S.C. §2000d-1, Congress directs that:

> "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of Section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders. . . ."

Pursuant to this Congressional directive, various departments have issued such rules and regulations. The University of Washington, and the law school, as recipients of Federal financial assistance, must abide by the rules and regulations of the Department of Health, Education and Welfare (HEW), which administers the assistance programs benefiting them. To effectuate the provision of Title VI quoted above, the Department of HEW promulgated regulations published at 45 C.F.R. 80.1 *et seq*. These regulations stated in relevant part:

> "§80.3 (b) (6) (i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effect of prior discrimination.
>
> (ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of con-

ditions which resulted in limiting participation by persons of a particular race, color, or national origin.

§80.4(a) Every application for . . . assistance . . . shall . . . contain . . . an assurance that the program will be conducted . . . in compliance with all requirements imposed by or pursuant to this part.

(d) (1) In the case of any application for Federal financial assistance to an institution of higher education . . . the assurance required by this section shall extend to admission practices . . .

§80.5(i) [If the effects of past discrimination still exist, an applicant may be required to take additional steps such as making] special arrangements for obtaining referrals or making selections which will insure that groups previously subjected to discrimination are adequately served.

(j) [Even if an applicant has never discriminated, but its services are not equally available to minority persons] an applicant or recipient may properly give special considerations to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served."

In considering various sections of HEW's regulations to effectuate Title VI, courts have held that great weight should be given to them. *United States v. Jefferson County Board of Education*, 372 F.2d 836, 847 (1966), *modified en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967). The Court, *en banc*, stated at page 390 that:

"These [HEW] guidelines and our decree are within the decisions of this Court, comply with the letter and spirit of the Civil Rights Act of 1964, and meet the requirements of the United States Constitution."

See also Griggs v. Duke Power Co., supra. The Court did not reach the question of the applicability of the Guidelines to *de facto* segregation, however, because that

situation was not presented. *See also Gardner v. State of Alabama, Dept. of Pensions and Security*, 385 F.2d 804 (5th Cir. 1967), *cert. denied*, 389 U.S. 1046 (1968).

The law school is required by HEW's Guidelines to take affirmative action to increase the numbers of minority persons in its classes, whether or not the underrepresentation has been caused by *de jure* or *de facto* segregation. Failure to take such action could result in a termination of receipt of Federal financial assistance. 45 C.F.R. 80.8. The law school's admissions policy is an appropriate response to assure that it is in compliance with HEW's regulations.

Affirmative action plans have also been required under rules adopted pursuant to Presidential Executive Order 11246, 3 C.F.R. 339, mandating equal employment opportunity by government contractors, and Presidential Executive Order 11478, 3 C.F.R. 133, mandating equal employment opportunity for federal employees. Order 11246 is administered by the Secretary of Labor, while Order 11478 is enforced by the United States Civil Service Commission.

The Secretary of Labor established the Office of Federal Contract Compliance (OFCC) to administer Executive Order 11246. OFCC has issued regulations requiring recipients of both federal procurement (41 C.F.R. 60-2.1 *et seq.*) and federally assisted construction contracts (41 C.F.R. 60-1.1 *et seq.*) not only to assure the government that they will not discriminate, but also to undertake affirmative action to assure that non-discriminatory practices are followed. In the construction area, to coordinate compliance efforts of each federal agency, the OFCC developed area plans requiring detailed affirmative action. Plans have been upheld in several cases including *Contractors Ass'n of Eastern Pennsylvania v. Shultz, supra*, and *Southern Illinois Builders Ass'n v. Ogilvie, supra*.

The goal of the affirmative action plans required by the OFCC is to promptly eliminate any situation where there is underutilization of minority persons. This is also the goal of the affirmative action plans required of each federal agency under rules and regulations issued by the United States Civil Service Commission pursuant to its responsibility under Order 11478. 5 C.F.R. 713.

Thus, the federal government has recognized the utility of the use of affirmative action plans to eliminate any racial discrimination, requiring the recipients of federal grants or contracts, including state universities, to take affirmative action to eliminate the effects of bias. The law school should not be held to have violated the law because it voluntarily undertook to eliminate racial discrimination.

The goal of affirmative action has been to eliminate the effects of discrimination without attempting to assign blame to anyone. Where statistical evidence shows that minority persons are underrepresented, for whatever reason, affirmative action is essential in correcting the effects of past discrimination. Thus, statistical evidence showing that minority persons are underrepresented in the construction crafts led to OFCC's requirement of affirmative action. Underrepresentation in federal agencies led to the United States Civil Service Commission's requirement of affirmative action. Similarly, the law school recognized the underrepresentation of minority persons in its law classes and the legal profession, and determined to eradicate this underrepresentation by taking affirmative action to increase the number of minority students admitted. The law school's action is consistent with the public policy of this nation.

CONCLUSION

The admission to and graduation from a law school is both an educational experience and, in most instances, a prerequisite to subsequent employment as a licensed attorney. The Supreme Court of Washington found that the State had several compelling interests in these areas that warranted the admissions policy utilized by the University of Washington. Initially, a state has a valid interest in promoting integration in its publicly supported educational facilities. Further, there may legitimately exist a concern that the composition of a law school reflect the make up of the community into which its graduates will enter.

Today, the ratio of minority groups in many metropolitan areas is increasing, but without a policy of encouraging greater representation in the legal profession, there will not be sufficient minority lawyers who because of their specialized skills can vocalize the needs of the communities. Realistically, the presence of attorneys who are members of the majority group or attorneys of another minority class is not an adequate substitution when factors such as language barriers and ethnic experience are considered. Finally, underrepresentation in the legal profession, unlike the other professional disciplines, has a farther reaching effect in our system. Disproportionate numbers of minority lawyers multiplies throughout our federal, state and local governmental institutions resulting in inadequate representation in all levels of government.

In conclusion, we urge this Court to affirm the decision of the Supreme Court of Washington. However, if this Court feels that it cannot reach the merits of the case in the absence of additional evidence of past discrimination in this record, it could vacate the order of the Supreme Court of Washington and remand the case back

for a further determination of whether past discrimination existed and with specific guidelines for the lower court on the kind of evidence which should be considered in reaching the determination.

Respectfully submitted,

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